

TITLE 328 FINANCIAL ASSURANCE BOARD

#08-684 (FAB)

SUMMARY/RESPONSE TO COMMENTS RECEIVED FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from July 28, 2009, through August 28, 2009, on IDEM's draft rule language for amendments to the underground storage tank excess liability (ELTF) trust fund rules at 328 IAC 1. Comments were received from the following:

Christopher Braun, Angela Dorrell, Attorneys,	
Petroleum Marketers and Convenience Store Association	(IPCA)
Michael Ackerman, Ackerman Oil Co, Inc.	(Ackerman)
Linda Kelley, SESCO Group	(SESCO)
Steven A. Browning, Jacob W. Smith,	
American Environmental Corporation	(American)
Curt Luebbert, SCS Environmental Contracting	(SCS)
Debra A. Baker, Crystal Flash Petroleum	(CF)
Andrew D. Trowbridge, URS Corporation	(URS)
Morgan Saltsgiver, Dave Sbieszkowski,	
Michael Schutz, August Mack Environmental	(AME)
Jeffrey Timmons, Phil Schlak, ATC Associated, Inc.	(ATC)
Fred W. Nichols, Astbury Environmental Engineering, Inc.	(AEE)
Martin Ryan, Dwayne Keagy, Environmental Resources Management	(ERM)
Kim Forester, Active Environmental Services, Inc	(Active)
Michael L Wirt, Rusty W. Wheat, Terra Environmental, Corp.	(Terra)
Stephen Lewis, Road Ranger Enterprises, Inc.	(Road Ranger)
Brenda Parr, Jeffrey Timmons, Phil Schlak, ATC Associates, Inc.	(ATC)
Rick Olson, Earth Exploration	(Earth Exploration)
Philip N. Ward, geologist	(Ward)
Michael S. Bracey, Speedway SuperAmerica LLC	(SSA)
Michael Schutz, Midwestern States Environmental Consultants Association	(MSECA)
James Carr, Hydrophase, Inc.	(Hydrophase)
Alan J. Cubberly, Circle K Great Lakes	(Circle K)
James A. Berndt, Paul Troy, Troy Risk, Inc.	(Troy)
Gregory J. Cobb, Freedom Oil, LLC	(Freedom)

Comments: Definition of "Confirmed/Fund Qualifying Occurrence"

--Unable to identify a specific release event and ELTF should pay for minor spills during operation. Historical release impacts cannot be placed in time exactly and quantified release amounts. (ATC) (Troy) (Freedom) (Circle K) (American) (SSA) (MSECA) AME) (CF) (Ward)

---A concern over many releases being disputed in court, which is a waste of time and money. (ATC)

---A concern that minor spills and overfills should be eligible for the fund. (Terra)

---The proposed language potentially excludes releases discovered during Phase II, tank closures, upgrades, etc. (Circle K) (American) (SSA) (Ward) (Ackerman)

---Mentions that UST systems are permitted to lose 1% of thru-put and therefore not all contamination will be attributed to an “occurrence”. Also recommended some inclusions. (Active) (Ward)

---Wants all types of releases to be eligible. (IPCA)

---Wants to add “...not solely derived from...” to the definition (ERM)

Response: The definition of “confirmed occurrence” has been deleted; making the terms consistent with “fund qualifying occurrence”. “...from the dispenser...” was added after the words “overfills”.

Comment: Definition of “substantial compliance”.

---Does not like the term “suspected” used in the definition and in the rule. (Terra) (Troy) (IPCA)

---Does not like the term “harm to human health and the environment” as used in the rule. Many or all releases could harm human health and the environment. (Troy) (MSECA) (AME) (IPCA)

--- The definition should be clearer. (MSECA) (AME)

---Retain the 24 hour notification in the definition. (Ward)

Response: In 328 IAC 1-1-9(b) (1) the word “reported” was changed to “confirmed”. There were not any other changes.

Comment: Definition of “UST system”.

---UST system should include dispensers as those cannot operate independently. (Terra) (Troy) (Road Ranger) (IPCA)

---Dispensing components should be part of “ancillary equipment” in the UST rule. (IPCA)

Response: Subdivision (b) was deleted so that the definition would be identical to the definition of “UST system” in 329 IAC 9.

Comment: Should allow for an affidavit to be evidence of payment. (Circle K)(American)(SSA)

Response: In 328 IAC 1-3-1(b) (1) Replacing “Evidence of payment” with “Documentation of costs incurred”.

Comments: The time limits are ambiguous and there are several situations that could cause the time limits to not work or go over through no fault of the owner/operator. (ATC) (Troy)

---There should not be a time limit on eligible costs. (Terra)

Responses: In 328 IAC 1-3-1(b) (4) (B), the time limit for grandfathered resubmittals is changed from 6 months to 12 months.

Comments: General Fund access:

---328 IAC 1-3-1(e) is unnecessary and will cause the need for more legal interpretations. (Terra)

---The word “worse” is vague. Many activities at an UST closure may temporarily make the site “worse”. Also, the words “mis-using equipment” is vague. (Troy) (Road Ranger) (IPCA)

---“Pre-approval should be available to all parties defined in 328 IAC 1-3-1.

Response: In 328 IAC1-3-1(b) (5), eligibility requirements will be changed from “approval of” to “submission of” initial site characterization (ISC). In two places, the word “worse” will be changed to “contributing additional contamination”. In 328 IAC 1-3-1(e), delete the words “at the time of filling”. In 328 IAC 1-5-2(c), change the section title by deleting “eligibility pre-approval” in heading.

Comments: In 328 IAC 1-3-1.2, paper copies should not be required. (Troy)

Responses: IDEM is not prepared at the time to go paperless; however, the section does allow for this at a later time.

Comments: ISC required for eligibility in 328 IAC 1-3-3(a).

---Information should have already been provided to determine eligibility prior to completion of an ISC. (ATC) (CircleK)(American)(SSA)

---There is not an advantage to IDEM to require an ISC for eligibility and it is a financial burden for the responsible party. (Troy)

---The owner/operator or responsible party should be able to determine eligibility at any time, even prior to release. (Freedom) (MSECA) (AME) (Ward)

---Eligibility determination should be part of a system auditing for owners/operators or responsible parties. (MCECA)(AME)

Responses: It is necessary for IDEM to have an ISC to determine eligibility. No change was made.

Comments: Five percent deductions for late initial site characterization (ISC) and late release reporting.

---Sixty days is a short time period for ISC preparation; would like to see it either 90 or 120 days. (ATC)(IPCA)

---The State has other mechanisms in place to enforce late reporting and should not make payment deductions. (Terra)(IPCA)

---There are a lot of factors that could cause an ISC to be delayed that should not impact eligibility. Recommended ruling from Office of Environmental Adjudication. (Troy)(Circle K)(American)(SSA)

---Concerned that late reporting out of the responsible party’s control could affect eligibility. Seems extreme—against the intent of the fund. (Freedom)(AME)(MSECA)(IPCA)

---SC approval milestone is incentive enough to get ISCs submitted in a timely fashion. (Circle K)((SSA)(Active)(Ward)

---This will result in more appeals and slow down investigation and cleanups. (Circle K)(American) (SSA)

--- Require an IDEM report reviewing deadline. (Active) (Ward)

---There are a lot of factors that could cause an LSC to be delayed that should not impact eligibility. There should be an extension mechanism in place. (Road Ranger)

---Concerned about situations where the owner and operator are separated and the actions of one may affect the eligibility for the other. (CF)

Response: This is a federal requirement and there will be no change to the 60 days. A deduction is appropriate and no change will be made.

Comment: UST removal is not eligible for reimbursement.

---It may be more cost-effective to remove the UST rather than dig around it. (Troy)

---Tank removal should be eligible for reimbursement if it is necessary for corrective action. (Freedom)

---Tank removal should be eligible for reimbursement if the removal is part of an approved corrective action plan. (ERM) (Ward)

Response: There is no change.

Comment: Would like to be able to mark up utilities and permits. (Terra)

Response: There is no change.

Comment: There are questions about the Attorney General qualifications for determining fair market value.

Response: There is no change.

Comment: Contractor tasks, such as cost estimates and reviewing documents, are not eligible for reimbursement. These activities are part of the corrective action plan preparation and should be eligible. (Troy)

Response: 328 IAC 1-3-5(d) (10) (A) will be changed to include “and budgeting or budgeting”.

Comment: Changing contractors is not eligible for reimbursement. These costs should be approved because it can be beneficial in some cases, otherwise, this could result in poor work quality.

Response: 328 IAC 1-3-5(d) (10)(B) will be changed to include “Changing contractors.” with a sub-item of “Reviewing environmental work or documents.” Subdivisions (C) and (D) will be deleted.

Comment: Phase II costs are not eligible.

--Because Phase II is part of the initial site characterization then the language is inconsistent. (Terra)

--Phase I and Phase II assist in cleanup and should be eligible for reimbursement. (Troy)

Response: The language that does not allow eligibility for Phase I and II has been deleted.

Comment: Drilling methods and rates.

--The administrator should not evaluate cost effectiveness of the drilling technique based on the conditions that may not have been known during the planning. (ATC)

--Accept only rates or bids but not both for an item. (ATC)

--Blind drilling rate is too low—it costs \$18 to \$20 per foot. (Circle K) (American) (SSA)

--- The blind drilling rate is too low at \$10 to \$12 per foot and has demonstrated that a blind drilled well rate should be \$17.50 per foot. (Earth Exploration)

--- Should have an allowance for 12 ¼ inch augers for double cased wells. (SCS)

---Would like to specify a drilling rate for ¾ inch and 1 inch wells. (SCS)

---Would like to bill staff for a utility location call. (SCS)

---Would like to specify a cost for drums. (SCS)

Response: There are no changes. IDEM believes that the reimbursement rate for blind drilling includes boring and well installation materials. A 12 ¼ inch auger does not drill an appropriate well size.

Comment: PPI adjustment.

---Labor rates should have increased about 20% since the last adjustment made in the rule. (Circle K) (American) (SSA)

Response: IDEM has updated the rule to include the most recent PPI calculations for the Management and Technical Consulting Services category (5416), which includes Environmental Consulting Services (541620). The Technical Consulting Services category is only calculated back to 2006. Therefore, we used an average of the past two year and applied it back to 2003. The last change in labor rates was effective on November 15, 2001. The PPI increase from June of 2008 to June 2009 is only 1.6, which is significantly less than the average.

Comment: Corrective Action Technologies.

---There is concern over bid breakdown evaluation. (ATC) (Terra)(Troy) (Circle K) (American) (SSA) (AME) (MSECA) (Ward)

---Requesting that United States postage paid for reports is reimbursable. (Troy)

Response: The rule language will be clarified.

Comment: Rental equipment rates.

---Suggested rental equipment rates be checked and updated such as water quality meters and generators. (ATC)

Response: There is no change.

Comment: Personnel Rates and Classifications.

--- Suggested that principal and seniors remain the same.

Also does not like the certification requirements. (ATC)

---The personnel rates and classifications should stay the same. However, principal should review and staff for monitoring. (Terra)

---Certification requirement is inconsistent with ELTF personnel policy (task-based rather than qualification based). (Troy)

---Would like to include some of the original senior project manager tasks such as “coordination with IDEM”. (Circle K) (SSA) (American)

--- Does not want the certification requirements. Personnel distinctions should be experience based. (American) (Circle K) (SSA)

--- The combination of rate adjustments and task adjustments in the rule reduces their pay. (AEE)

---Does not want the certification requirements. This should just be designated as a highly qualified environmental professional without the certification. (URS)

---Would like to reinstate the “Senior Technician”. (URS)

--- Does not understand how an attorney can perform their job without reviewing the consultant’s reports. (Road Ranger)

---Would like to recommend that attorneys be paid at the excess liability trust fund labor classes and only for completing that type of work, such as assisting in cleanups. (Ward)

Response: The leaking underground storage tank rule requires signature of one of these certification levels and requiring certification associates the appropriated level of knowledge with the task required.

Comment: Limit on the number of resubmittals.

--- This change doesn’t seem reasonable due to the lack of clarity/specificity of denials sometimes. (Terra)

---Unnecessary restriction on responsible party’s ability to recover funds. A lot of scenarios can occur that would require more than 3 resubmittals of the same costs. (Troy)

---There should be no limit for claims that are the fault of IDEM or the consultant, Navigant. (Circle K) (SSA) (American) (AME) (MSECA) (Ward)

Response: No change was made. Correcting an administrative error does not require a resubmittal to the department.

Comment: Third party investigation results concerns.

---There are concerns over the 45 days deadline (Freedom)

Response: No change was made.

Comment: Claimed that the ELTF administrator was holding onto funds and “changing the rules in the middle of the game”. (Road Ranger)

Response: No change was made.

Comment: The department and the Financial Assurance Board does not have the statutory authority to make the proposed changes because (1) it limits the owner/operator's access to the fund (2) IDEM incorrectly state that the Financial Assurance Board has the authority to change the rule. (IPCA) (Hydrophase)

Response: The Financial Assurance Board does have the authority to change the rule.

Comment: IDEM has not followed the correct rulemaking procedures. Requests that IDEM include in the board packets a statement of balance of previous tank fees owed on annual bills. (IPCA)(Hydrophase)

Response: IDEM has followed the correct rulemaking procedure. It is possible to include this information with future board materials.